Supreme Court, U.S.
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In The Supreme Court of the United States

LELAND C. GAUTIER,

Petitioner,

v.

JUSTIN JONES, IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF CORRECTIONS OF THE STATE OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the fact of current dangerousness is immaterial to Oklahoma's sex offender registration scheme when a registrant's classification and thus registration period is statutorily defined and determined by his purported increasing "danger to the community."

II. Whether a sex offender registrant, once subject to a ten year and now facing a lifetime registration requirement imposed retroactively without any process, has any operative Constitutional rights given the inapplicability of *ex post facto* protection and the Tenth Circuit's effective elimination of due process protection, done without regard to the particular statutory scheme under review and in contravention to Supreme Court due process precedent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. THE TENTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT PRECEDENT	6
A. OSORA's Scheme Shows Current Dangerousness to Be Material	6
B. The Panel's Opinion Applies *CDPS*, with its Different Facts and Statutory Scheme, to OSORA'S Statutory Scheme, Conflicting with and Unduly Stretching *CDPS*	8
II. THIS COURT SHOULD REVIEW THE RULING BELOW TO SETTLE INCOMPATIBLE CONSTITUTIONAL RIGHTS TREATMENT AND IMPORT EQUITY	13

TABLE OF CONTENTS – Continued

Page

A. The Nullification of *ex post facto* Rights, Premised on Regulation for Public Safety, and Procedural Due Process Rights, Based on Danger Being Immaterial to this Regulation, Is Not Logically or Legally Tenable 13

B. The Tenth Circuit Ruling Unjustly Eliminates Any Remedy as to Petitioner's Situation of Lifetime Registration 14

C. The Gravity of Constitutional Rights at Stake Merits a Devoted Review to Replace a Markedly Deficient and Erroneous One 19

APPENDIX

Appendix 1: Tenth Circuit Opinion .....App. 1-7

Appendix 2: U.S.D.C. for the Western District of Okla. Opinion .....App. 8-40

Appendix 3: U.S.D.C. for the Western District of Okla. Judgment.....App. 41-42

Appendix 4: Tenth Circuit Order denying rehearing .....App. 43-44

Appendix 5: Statutes

Okla. Stat. tit. 57 § 582.5 (superseded)....App. 45-47

Okla. Stat. tit. 57 § 582.5 (current).....App. 48-50

Okla. Stat. tit. 57 § 583 (superseded).....App. 50-58

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 16

Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1 (2003) [CDPS] ..... *passim*

Mathews v. Eldridge, 424 U.S. 319 (1976) 16

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) 15

Paul v. Davis, 424 U.S. 693 (U.S. 1976) 16, 18

Smith v. Doe, 538 U.S. 84 (2003) 14

State of Utah v. Briggs, 1999 P.3d 935 (Utah 2008) 17

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 15

United States v. Turkette, 452 U.S. 576 (1981) 12

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 16, 17, 18

STATUTES

Conn. Gen. Stat. § 54-252 9

Conn. Gen. Stat. § 54-257 10

Conn. Gen. Stat. § 54-258 10

Okla. Stat. tit. 21 § 1123(b) 2, 3

Okla. Stat. tit. 57 § 582.5 ..... 2, 6, 7, 12

Okla. Stat. tit. 57 § 583 ..... 3, 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

XIV AMENDMENT TO THE U.S. CONSTITUTION 2, 4, 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Leland Gautier respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1) is an unpublished opinion but is found at 2010 WL 358098 (C.A.10 (Okla.)). Petitioner's Motion for Rehearing En Banc was denied by the Court of Appeals on March 2, 2010 (App. 4). Petitioner's case in the United States District Court for the Western District of Oklahoma is found at 2009 WL 1444533 (W.D.Okla.).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") sought to be reviewed was filed on February 2, 2010, and the Order denying Petitioner's Motion for Rehearing En Banc was entered on March 2, 2010. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is being filed within 90 days of the entry of the Tenth Circuit's Order denying rehearing en banc. This Court has jurisdiction to

review the judgment of the U.S. Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue is Okla. Stat. tit. 57 § 581 et seq., the Oklahoma Sex Offenders Registration Act (**hereafter "OSORA"**), as applied to Petitioner's situation. The relevant statutory provisions from OSORA involved, Okla. Stat. tit. 57 §§ 582.5 and 583 are set out in their entirety in Appendix 5. It should be noted that these statutes have since been superseded, effective November 1, 2009, which was after the Western District of Oklahoma Court's ruling in this case. However, the pertinent language, regarding current dangerousness, remains in the current form of OSORA.

XIV Amendment to the U.S. Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 1996 Petitioner Leland Gautier was charged with sexual battery upon a person under 18 years old, pursuant to Okla. Stat. tit. 21 § 1123(b). The girl he

allegedly touched was 17 years of age at the time. Petitioner pled nolo contendere to sexual battery, Okla. Stat. tit. 21 § 1123(b), on March 18, 1997 and received a two-year suspended sentence as part of his plea. Mr. Gautier was required to register as a Sex Offender for ten (10) years, plus the two year suspended sentence, pursuant to the statute in effect at the time of his plea. Fourteen years later, Petitioner has not had any legal problems since he entered the plea of nolo contendere, and he fulfilled all of the conditions of his plea and probation. Accordingly, Mr. Gautier was set to be removed from the Sex Offender Registry and its burdens on March 18, 2009 with much anticipation.

However, Petitioner received a letter from the Oklahoma Department of Corrections ("ODOC") in early January of 2008 that informed him that he had been reclassified as a lifetime registrant due to recent changes to the Oklahoma Sex Offender Registration Act. This letter did not specify anything that he could do or say about this change. Leland Gautier would have been entirely removed from the requirement to register as a sex offender on March 18, 2009 if his status had not been unilaterally and retroactively changed. He is now required to register as a sex offender for the rest of his life, pursuant to Okla. Stat. tit. 57 § 583.

Petitioner filed an appeal less than a month after receiving the January 2, 2008 letter informing him he was a Sex Offender registrant for life. A few months later, Petitioner through his counsel received a return

letter advising him that his "tort" claim had been denied. Petitioner was informed a "determination has been made that the state was not negligent" and was presented with the Government Tort Claims Act as the basis for the denial.

Petitioner commenced his action, on April 28, 2008, in the United States District Court for the Western District of Oklahoma, alleging several claims: 1) that the retroactive application of a new registration period violated the terms of his plea agreement 2) that this unilateral extension was done without any requisite procedural due process and violated Mr. Gautier's liberty interest in both his reputation and in his prior state-imposed and accepted legal status 3) that OSORA violated substantive due process under the Fourteenth Amendment to the U.S. Constitution and Oklahoma Constitution and that 4) the retroactive application of OSORA's new lifetime registration upon Mr. Gautier violated the *ex post facto* clauses of the U.S. and state Constitutions.

The United States District Court for the Western District of Oklahoma found in favor of Mr. Gautier on his procedural due process claim. The Court's Judgment reads:

> Application of the Oklahoma Sex Offender Registration Act, Okla. Stat. tit. 57 § 581 et seq., to Petitioner, absent a hearing regarding his current dangerousness, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendant is enjoined from enforcing its

> provisions against Petitioner unless and until he is provided with such a hearing.

[See District Court Judgment, App. 3]. The District Court denied Mr. Gautier's other Constitutional claims regarding the application of OSORA to his situation.

Defendant Justin Jones appealed to the United States Court of Appeals for the Tenth Circuit, which reversed the District Court's Order. The Tenth Circuit based its reversal on *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), stating:

> "We find it unnecessary to reach this question, however, because even assuming, [for the sake of argument], that [Gautier] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [Oklahoma] statute."

[Tenth Circuit Opinion, App. 1] (quoting *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1, 7 (2003)) (**hereafter "CDPS"**). Relying on *CDPS*, the Tenth Circuit reversed the District Court's injunction that Leland Gautier must be given a hearing before he was classified and registered under the revised OSORA registration scheme.

Thus, despite the retroactive change in state-imposed legal status and the label affixed to Mr. Gautier by OSORA's clear statutory terms, no due process was given or has been given to Mr. Gautier as to his re-classification and registration. OSORA stretched his obligation to register and concomitant, inexorable stigma as a sex offender from the initial

ten years throughout the rest of his life. Mr. Gautier petitions for an opportunity to be heard in accordance with procedural due process rights before these life altering changes are imposed upon him and his family.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

A. OSORA'S Scheme Shows Current Dangerousness to Be Material

Petitioner contends OSORA is unconstitutionally applied to him without due process. The Tenth Circuit's Opinion states, "[D]ue process does not require the opportunity to prove a fact that is **not material** to the State's statutory scheme." [Tenth Circuit Opinion, App. 1] (quoting *CDPS*, 538 U.S. at 4). Yet a crucial part of OSORA's scheme is the "sex offender screening tool" under Okla. Stat. tit. 57 § 582.5. Section 582.5(B) explains, "The risk assessment review committee . . . shall: 1. Develop or select from among existing tools, a sex offender screening tool to *be used in determining the level of risk of a person* subject to registration pursuant to the provisions of the Sex Offenders Registration Act."[1] This sex

[1] OSORA was revised soon after the District Court Order and the new statutes became effective November 1, 2009. See App. 5 for current version of Section 582.5

offender screening tool was to be calibrated to three statutory risk levels, set out in Section 582.5(c) as follows:

> 1. Level one **(low)**: a designated range of points on the sex offender screening tool **indicating that the person poses a low danger to the community** and will not likely engage in criminal sexual conduct;
>
> 2. Level two **(moderate)**: a designated range of points on the sex offender screening tool **indicating that the person poses a moderate danger to the community** and may continue to engage in criminal sexual conduct; and
>
> 3. Level three **(high)**: a designated range of points on the sex offender screening tool **indicating that the person poses a serious danger to the community and will continue to engage** in criminal sexual conduct.

As for the statutory scheme's construction, the simple fact is that the tool was to be used for the purpose of placing an offender into one of three levels. These levels are **solely defined by, as the statutory language makes plain, a certain level of "danger to the community."** Okla. Stat. tit. 57 § 582.5. Indeed, under the OSORA statutory scheme, the tool is used to classify an offender into a level, which level is not only based upon but which *sine qua non* is a registrant's "danger to the community." A sex offender registrant's level classification then singularly determines his registration period under the Act. For

instance, Petitioner Mr. Gautier, having pled no contest to sexual battery upon a 17 year old, was re-classified a level 3 risk, and so his corresponding registration period for OSORA is "for life" under Section 583(C)(3).

The fact of current dangerousness is certainly material to OSORA's statutory scheme; the key statutes themselves explicitly reveal as much. It is difficult to understand, viewing the classification statute that dictates the registration period, how the fact of danger to the community is not material to the statutory scheme. Not only does the crucial statute explicitly use the very words "danger to the community," but also it is obvious that the graded classification scheme is constructed solely by an increasing risk to the community: from **low risk** (level 1) to **moderate risk** (level 2) to **serious risk** (level 3). Yet the Tenth Circuit found current dangerousness utterly "immaterial to the State's statutory scheme." There is certainly a gap between the clear statutory language and purpose of OSORA and the Tenth Circuit's disjointed conclusion.

B. The Panel's Opinion Applies *CDPS*, with its Different Facts and Statutory Scheme, to OSORA's Statutory Scheme, Conflicting with and Unduly Stretching *CDPS*

The unreconciled gap occurs because the Tenth Circuit loosely applies *CDPS*'s language to a disparate

factual situation; a disparate statutory scheme; and a disparate injunction arising from a disparate statutory scheme. In short, the Tenth Circuit departs from principled legal analysis and, instead, deploys conclusory citations to *CDPS*, citations divorced from the facts and the Connecticut statute under review in *CDPS*. "Due process does not require the opportunity to prove a fact that is not material to the state's statutory scheme," the Tenth Circuit, citing *CDPS*, states of OSORA and its very different statutory scheme. (App. 1)

However, *CDPS* reviewed the *Connecticut Sex Offender Registration Act, not OSORA*. The differences between the Connecticut and Oklahoma Act are manifold. A few crucial differences, however, suffice to demonstrate the Tenth Circuit's superficial use of *CDPS* and thus to demonstrate the necessity for this Court's review. First, the phrases "currently dangerous" or "risk to the community" did not appear in the Connecticut Act reviewed in *CDPS*.[2] Neither, even, did the words "risk" or "danger." The notion of the registrant being a "danger to the community" was not expressed by Connecticut's statutory scheme.

The Connecticut Act **did not explicitly predicate sex offender registration upon any danger**

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[2] In *CDPS*, the previous version of Conn. Gen. Stat. § 54-252 required lifetime registration and is the statute referred to above as showing the Connecticut Act's lack of reference to current danger.

to the community, as does OSORA. These differences between the two Acts are consequential, but the Tenth Circuit did not even attempt to address any differences between Connecticut's "statutory scheme" and OSORA's, as urged by Mr. Gautier. The Tenth Circuit improperly applied *CDPS* to different facts and to a different statutory scheme, but precedent is not to be used so breezily, unmindful of glaring differences that should distinguish cases. This Court should review the case to correct such an improper and dangerous use of precedent.

Not only are Connecticut's and Oklahoma's Acts different, the injunctions under review in these cases concerned different facets of these Acts. *CDPS* explains, "In particular, the law requires DPS to post a sex offender registry on an Internet Website and to make the registry available to the public in certain state offices." 538 U.S. at 5 (citing Conn. Gen. Stat. §§ 54-257, 54-258). Most importantly for *CDPS*, the former Connecticut Act required the Connecticut Department of Public Safety to publicize *all registrants' information* via this website. In *CDPS*, it was this **public disclosure** to which the respondent objected and which was the subject of the lower court rulings. *CDPS*'s task was "to determine whether the United States Court of Appeals for the Second Circuit properly enjoined the **public disclosure of Connecticut's sex offender registry**." *Id.* at 3-4. Specifically, the *CDPS* Court was reviewing the Second Circuit Court of Appeals' ruling that "**such disclosure** [of the registry] both deprived registered sex offenders of a

'liberty interest' and violated the Due Process Clause . . . " The District Court in *CDPS* "permanently enjoined the **law's public disclosure provisions**," but an injunction of public disclosure of the registry is not involved in this case. *Id.* at 4-5. Here, Petitioner is not contesting OSORA's "public disclosure provisions." Rather, Petitioner contests the time period of **registration** under OSORA, that is, how long one is to register and be subject to the requirements of the entire Oklahoma Act. Mr. Gautier asserts that his unilateral classification as level 3, and resultant lifetime registration, contravenes due process principles and protections under the United States and Oklahoma Constitutions.

The difference in what facet of the Act was enjoined in *CDPS* versus what was enjoined in Petitioner's case should be meaningful, as should the different statutory schemes themselves. Importantly, if one was registered under the former Connecticut Act, then his or her information must be publicly disclosed irrespective of his or her current dangerousness; thus an opportunity for the registrant to be heard as to his or her current dangerousness would not change anything *with respect to the public registry requirement.* That is why, in *CDPS*, "the facts [respondent sought] to establish [current dangerousness] in that hearing [were not] relevant under the statutory scheme." *Id.* In sum, Connecticut did not make current dangerousness expressly material to the *public disclosure of the sex offender registry*, as Oklahoma has done with respect to *classification and*

registration under OSORA. Unlike its Connecticut counterpart analyzed in *CDPS*, OSORA's provisions concerning registration are **clearly based upon and make explicit designations** of a registrant's current dangerousness.

Considering that a sex offender registrant's registration period is solely based on his assigned level under Section 582.5, which level slopes up or down based solely upon varying "danger to the community," how could danger to the community not be a fact material to the statutory scheme? At issue is the classification and registration period of Mr. Gautier under OSORA. Therefore, how could express statutory language and the levels that determine one's registration not be material to the registration requirement? Despite the differences between the Connecticut and Oklahoma Acts and the importance of personal Constitutional rights, the Tenth Circuit does not answer these pressing questions in ignoring the statutory language of OSORA's scheme.

Statutory interpretation is necessary to determine what is "material" to a statutory scheme. *United States v. Turkette*, 452 U.S. 576, 580 (1981) provides, "When called upon to interpret a statute, the court must first examine the statutory language itself." Petitioner submits that simple statutory interpretation, using the plain language of the statute, demonstrates that the fact of current dangerousness is material to OSORA and that he is being stigmatized thereby without due process.

II. THIS COURT SHOULD REVIEW THE RULING BELOW TO SETTLE INCOMPATIBLE CONSTITUTIONAL RIGHTS TREATMENT AND IMPORT EQUITY

A. The Nullification of *ex post facto* Rights, Premised on Regulation for Public Safety, and Procedural Due Process Rights, Based on Danger Being Immaterial to this Regulation, Is Not Logically or Legally Tenable

The Court, at this time in modern Constitutional jurisprudence concerning the registration of sex offenders, faces a scenario affecting a small sub-set of sex offenders. These persons who are made subject, without any due process, to retroactive, lifetime registration are oddly caught in a Constitutional Catch-22. On one hand, *ex post facto* protection does not apply, as this Court and others have concluded a sex offender registration scheme is not punitive because it is a civil measure for the safety of the public. On the other hand, if the Tenth Circuit's opinion stands, procedural due process protection would not apply because a registrant's danger to the community is not material to sex offender registration schemes. However, how can sex offender registration schemes be deemed public safety measures unless there is at least some jeopardy to the public safety that these schemes seek to remedy? What would the danger to the public be unless it were the risk posed by the individual sex offender registrant to his or her community? It seems highly incongruous to classify the

registration scheme as protecting the community for one purpose and, for another, to declare that such sex offenders' risk to the community does not matter at all to the same regulatory scheme.

Put into a Constitutional rights framework, this situation is unfair and untenable: Sex offender registrants' collective risk to the community warrants a civil scheme, taking this scheme outside of the *ex post facto* provision, but registrants' risk posed to the community is allegedly outside the scope of sex offender registration schemes. Such a scenario borders on absurdity, essentially carving out an airtight alcove between *ex post facto* and substantive and due process protections. It is a legal scenario that leaves a person, who accepted and served a finite registration period, without any recourse whatsoever should the state choose to later subject him to lifetime registration, all without any process afforded to him and thus without any cost incurred by the state. Indeed, in Mr. Gautier's case, the Tenth Circuit decision completely eliminates any remedy he has to contest the validity of his being marked and treated by the state as a "danger to the community" and recidivist, as expressly stated by the applicable classification statute.

B. The Tenth Circuit Ruling Unjustly Eliminates Any Remedy as to Petitioner's Situation and Lifetime Registration

Courts have taken *Smith v. Doe*, 538 U.S. 84 (2003), to stand for the broader proposition that **all**

sex offender registration schemes are civil measures. Petitioner's *ex post facto* claim was thus denied by the District Court, which also denied Petitioner's substantive due process claim, reasoning that a liberty interest in "one's good name or reputation" is not a fundamental right. Therefore Mr. Gautier's only means to contest the Constitutional validity of his being unilaterally rendered a lifetime sex offender registrant resided in procedural due process rights lodged in the Fourteenth Amendment to the United States Constitution. The District Court, citing the language of OSORA, found that Petitioner was entitled to a predeprivation hearing before the state permanently labeled and registered him retroactively. [App. 2].[3] The Tenth Circuit's reversal has left Mr. Gautier with no operable remedy under OSORA.

Petitioner, pleading no contest to offensively touching a 17 year old and complying with all the incidents of his plea bargain, is unjustly deprived of a "meaningful opportunity to be heard," the essence of procedural due process. See *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) ("Fundamental requisite of due process of law is the opportunity to be heard"); *United States v. James Daniel Good Real*

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[3] While certainly such a hearing would implicate economic concerns beyond the focus of the Constitutionality of OSORA as applied to Petitioner, administrative measures can be crafted to properly govern classification hearings and thus to minimize the number of viable candidates for hearings on their OSORA label and classification.

Property, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process."). *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) states, "The **minimum requirements** of due process therefore are notice and an opportunity to be heard, and the hearing must be held at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 348 (1976), moreover, militates for judicial-type process given the risk of erroneous deprivation of Petitioner's liberty interest in his reputation and his status as a non-registrant.

However, Mr. Gautier is not even able to speak as to the stigma and scheme imposed upon him. This dearth of personal Constitutional rights compared to a state's liberty to officially label is contrary to the teachings of *Paul v. Davis,* 424 U.S. 693 (1976) and *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) concerning procedural due process. "[C]ertainly where the State attaches a 'badge of infamy' to the citizen, due process comes into play," states *Wisconsin. Id.* at 437 (quoting *Wieman v. Updegraff,* 344 U.S. 183, 191 (1952)). *Wisconsin* further counsels, "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat," *Id.* at 436. As to Petitioner's classification via OSORA, the District Court found it to be a clear statement:

> **Based on the statutory language found in the Act**, it is clear that by classifying Petitioner as a level III sex offender, **ODOC**

> **is making the statement** that he 'poses a serious danger to the community and will continue to engage in criminal sexual conduct.'

[See District Court's Opinion, App. 2]. The Tenth Circuit's opinion rendering this fact moot effectively relegates *Wisconsin*'s language and holding to the esteemed album of enfeebled history rather than effectuating it as vital precedent.

The simple fact here is that the state of Oklahoma has attached a permanent badge of infamy – via statutory language, drivers license demarcation, recurrent police visits, etc. – to Petitioner, and he has never had nor, possibly, ever will have due process rights in play as to this unilaterally affixed badge. Yet this badge carries a lifetime and unalterable legal status. Mr. Gautier did everything required of him under his plea, and he and his family were prepared and eager to again live a normal life when the state abruptly, and without any hearing, changed his registration tenure from a few remaining months to the rest of his life. He has been officially stigmatized and has undergone a dramatic change in legal status without being afforded any due process in concert with well established precedent.

Even *CDPS*, while holding *its petitioner* did not have a right to a hearing, did not eliminate this right when another state had **clearly labeled a citizen via clear statutory language** without any process being afforded as to the validity of this label. *State*

of Utah v. Briggs, 199 P.3d 935, 946-47 (Utah 2008) explains *CDPS*'s holding:

> The [CDPS] Court found that current dangerousness was irrelevant to Connecticut's statutory scheme because current dangerousness was not among the **statutorily enumerated criteria for who must register** . . . In other words, current dangerousness was irrelevant both to the **statutorily enumerated requirements of registration** and to the content or message of the registry . . . Indeed, Connecticut Department of Public Safety specifically provides that Petitioners are entitled to a hearing if the facts they seek to establish in the hearing are relevant to the statutory scheme.

Should the Tenth Circuit opinion remain, *CDPS* will be rendered indefinitely elastic, with no principled boundaries, and *Paul*'s *and Wisconsin*'s mandate will be circumvented and thwarted. This Court should reconcile the conflicting strands of jurisprudence in order a) to ensure the integrity and congruence of the legal system with respect to *ex post facto* and procedural due process, both a part of the paramount canon of personal Constitutional rights, and b) to ensure due process rights abide even in the midst of a complicated legal and political landscape.

C. The Gravity of Constitutional Rights at Stake Merits a Devoted Review to Replace a Markedly Deficient and Erroneous One

This Court should intervene to conduct a full analysis of very weighty Constitutional issues rather than allowing the Tenth Circuit's opinion, with its paucity of analysis, to nullify due process rights without the jurisprudential rigor that such issues deserve. The opinion below elides rather than analyzes any significant differences between the facts and statutory schemes of *CDPS* versus those at play here; it does not address any of Mr. Gautier's arguments to this effect which were thoroughly set forth on appeal.

By omitting any analysis of critical differences the Tenth Circuit opinion takes *CDPS* out of context and effectively eliminates the due process rights preserved by *CDPS*. Due process is thereby disabled for Mr. Gautier, who is labeled currently dangerous and a recidivist for the rest of his life and saddled with the Act's requirements, with absolutely no process. The Tenth Circuit's Order has left him without any remedy as to his lifetime status and stigma as a sex offender registrant. The Supreme Court should ensure that such a meaningful result – if it must occur – follows its thorough and principled review, rather than occurring absent an authoritative and properly devoted analysis. Most importantly, this Court should review the opinion below and uphold due process rights from being negated by an unconstitutionally applied scheme that will dramatically

alter lives without any voice given to those persons so affected.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LELAND J. GAUTIER, an individual, Plaintiff-Appellee, v. JUSTIN JONES, in his official capacity, Director, Department of Corrections of the State of Oklahoma, Defendant-Appellant.	No. 09-6123 (D.C. 5:08-CV-00445-C) (W.D. Okla.)

ORDER AND JUDGMENT*

Before **KELLY**, **PORFILIO**, and **O'BRIEN**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Justin Jones, the Director of the Oklahoma Department of Corrections, appeals from the district court's summary-judgment ruling that Oklahoma's Sex Offenders Registration Act (OSORA) violates Leland J. Gautier's procedural-due-process rights and may not be enforced unless there is a hearing regarding his current dangerousness. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

Background

In March 1997, Gautier pleaded no contest to a sexual-battery charge involving a seventeen-year-old female. He was given a two-year suspended sentence and required to register as a sex offender "for a period of ten (10) years from the date of registration." 57 Okla. Stat. Ann. § 583(C) (Supp. 1996). In 2004, the statute was amended to clarify that the registration period runs from the ending date of the sentence. *See* 2004 Okla. Sess. Laws, ch. 162, § 1. Thus, Gautier's registration requirement was set to end in March 2009.[1]

But in 2007, the Oklahoma Legislature substantially modified the OSORA. It required the Department of Corrections to "establish a risk assessment review committee" that would develop and employ "a

[1] Gautier does not challenge this amendment, and appears to suggest that he had anticipated at the time of his plea that the registration period would be counted from the end of his two-year sentence.

sex offender screening tool." 2007 Okla. Sess. Laws, ch. 261, § 26 (codified at 57 Okla. Stat. Ann. § 582.5 (Supp. 2009) (amended 2009)). The purpose of the tool was to identify an offender's "level of risk" based on "an objective point system," with the convicted offense "serv[ing] as the basis for the minimum numeric risk level." *Id.* The tool was to be calibrated to three risk levels:

> 1. Level one (low): a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;
>
> 2. Level two (moderate): a designated range of points on the sex offender screening tool indicating that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and
>
> 3. Level three (high): a designated range of points on the sex offender screening tool indicating that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.

Id.[2]

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[2] Effective November 2009, the risk assessment review committee was replaced by a "sex offender level assignment committee," and the screening tool was discarded, with the offender level being determined by "federal law" and the offense of conviction. 2009 Okla. Sess. Laws, ch. 404, § 4.

Each of the three risk levels was then given a specific registration period. Specifically, level-one offenders were given a fifteen-year period; level-two offenders were given a twenty-five year period; and level-three offenders were given a lifetime period. *Id.* § 27 (codified at 57 Okla. Stat. Ann. § 583(C) (Supp. 2009)).

Shortly after the 2007 changes to the OSORA took effect, the Department of Corrections notified Gautier that he scored a level three on its newly developed screening tool, which considered only "the severity of the sex crime and the number of sex crime convictions." Aplt. App. at 43. The screening tool in the record provides a level-three score for "Sexual Battery to [a] Person Over 16," Gautier's offense. *Id.* at 45. Accordingly, Gautier was notified of the lifetime registration requirement.

Gautier filed a civil-rights suit against Jones in federal court. He then sought summary judgment on the basis that the lifetime-registration requirement violated his plea agreement and his ex-post-facto and due process rights. The district court rejected Gautier's arguments, except in regard to procedural due process, which, it determined, mandated a hearing before Gautier could be classified as a level-three sex offender. Consequently, the district court granted Gautier summary judgment on that point and enjoined Jones from enforcing the OSORA against Gautier without such a hearing. Jones appealed.

Discussion

I. Standards of Review

"We review de novo the grant of summary judgment to determine whether any genuine issues of material fact were in dispute and, if not, whether the district court correctly applied the substantive law at issue." *Anderson v. Commerce Constr. Servs., Inc.*, 531 F.3d 1190, 1193 (10th Cir. 2008). "Because the parties do not dispute the facts, we have before us a purely legal question." *Id.* (quotation omitted).

II. Procedural Due Process

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Gautier contends that he has a liberty interest in not being labeled a level-three sex offender, i.e., someone who "poses a serious danger to the community and will continue to engage in criminal sexual conduct," 2 Okla. Sess. Laws 2007, ch. 261, § 27 (codified at 57 Okla. Stat. Ann. 582.5(C)(3) (Supp. 2009)). "We find it unnecessary to reach this question, however, because even assuming, [for the sake of argument], that [Gautier] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [Oklahoma] statute." *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7 (2003).

In other words, a convicted sex offender who challenges a registration requirement on the ground that he was not given a hearing to determine whether he is currently dangerous, must at least show that current dangerousness is relevant to the registration requirement. *See id.* (holding that Connecticut's Megan's Law did not violate procedural due process because "the law's [registration] requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest"). Here, the OSORA directed the development and use of a three-level screening tool that assigned a "*minimum* numeric risk level" based on the offense of conviction. 2 Okla. Sess. Laws 2007, ch. 261, § 26 (codified at 57 Okla. Stat. Ann. § 582.5(C) (Supp. 2009)) (emphasis added) (amended 2009). The tool that was ultimately developed and used in Gautier's case identified his crime as an offense warranting the highest risk level, three. Thus, Gautier's conviction alone was sufficient to place him in the highest level, without regard to any extraneous circumstances bearing on his proclivity to re-offend. Consequently, even if Gautier could prove he is not currently dangerous, it would not change his risk level, which, at a minimum, is level three. "[D]ue process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Conn. Dep't of Public Safety*, 538 U.S. at 4.[3]

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[3] The district court reasoned that *Connecticut Department of Public Safety* is not controlling because the OSORA uses the

(Continued on following page)

Conclusion

The judgment of the district court, to the extent of its procedural-due-process ruling, is REVERSED.[4]

Entered for the Court

John C. Porfilio
Circuit Judge

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offender's conviction as "the starting point to assess future dangerousness, not the sole factor." Aplt. App. at 292. But that reasoning ignores the fact that, in this case, the starting point (Gautier's conviction) was necessarily the ending point, given that the prescribed minimum risk level is the highest level. No other factor could have had any bearing on the assignment of Gautier's risk level.

[4] While this case was on appeal, the district court entered an order staying its procedural due-process ruling as to non-party sex offenders. That stay order is moot in light of our reversal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LELAND J. GAUTIER, an individual,	)	
Plaintiff,	)	
vs.	)	
JUSTIN JONES, in his official capacity, Director, Department of Corrections of the State of Oklahoma,	)	No. CIV-08-445-C
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed May 20, 2009)

Plaintiff filed this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983. Plaintiff claims that Defendant, in his official capacity as Director of the Department of Corrections for the State of Oklahoma, is depriving him of rights guaranteed to him under U.S. Const. art. 1, § 10; OK Const. art. 2, § 15; and U.S. Const. amend. XIV, § 2. (*See* Pl.'s 2d Amend. Compl., Dkt. No. 13.) Now before the Court are Plaintiff's Motion for Summary Judgment (Dkt. No. 26), Defendant's Combined Response and Motion to Dismiss (Dkt. No. 28), and Plaintiff's Reply (Dkt.

No. 30). For the reasons stated below, Plaintiff's motion is GRANTED.[1]

Background

On March 24, 1997, Plaintiff pleaded *nolo contendere* to the charge of sexual battery on a 17-year-old female and received a two-year suspended sentence. According to Plaintiff, he was required to register as a sex offender with the Oklahoma Department of Corrections (ODOC) for ten years based on the version of the Oklahoma Sex Offenders Registration Act (the Act) then in force. 57 Okla. Stat. § 583(C) (1996). On November 1, 2007, after Plaintiff's conviction, Oklahoma amended 57 Okla. Stat. § 581 *et seq.* On February 7, 2008, Plaintiff received a letter from the Oklahoma Department of Corrections informing him of these changes and telling him that, because he was assigned a risk level of III, he was required to register for life. Absent these changes, Plaintiff's registration period would have ended on March 18, 2009.

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[1] Intervenor, the United States of America, filed a Motion to Dismiss Plaintiff's constitutional challenges to the Federal Sex Offender Registration and Notification Act ("SORNA"). (Dkt. No. 27.) Plaintiff filed a Reply stating that he does not oppose Intervenor's Motion to Dismiss and explaining the reason for his non-opposition. (Dkt. No. 29.) Accordingly, the United States of America's Motion to Dismiss is GRANTED. The constitutionality of SORNA is therefore not at issue in this case.

Plaintiff now asks this Court for summary judgment, alleging that the State breached his plea agreement by changing his registration period from ten years to life. Plaintiff also argues that retroactive application of the lifetime registration requirement violates the *Ex Post Facto* Clause of both the U.S. Constitution and the Oklahoma Constitution, as well as the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Standard of Review

A motion for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is 'genuine' if the evidence allows a reasonable jury to resolve the issue either way and is 'material' when 'it is essential to the proper disposition of the claim.'" *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006) (citation omitted).

The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If the movant carries this initial burden, the nonmovant must then set forth "specific facts" outside the pleadings and admissible into evidence showing a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). These

specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324. "The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the district court." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Discussion

A. Plaintiff's Breach of Plea Agreement Claim

"Where the government obtains a . . . plea predicated in any significant degree on a promise or agreement with the prosecuting attorney, such promise must be fulfilled to maintain the integrity of the plea." *United States v. Hand*, 913 F.2d 854, 856 (10th Cir. 1990). General principles of contract law govern the interpretation of a plea agreement. *United States v. Cudjoe*, 534 F.3d 1349, 1353 (10th Cir. 2008). Thus, the Court must " 'look to the express language in the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of the promise at the time of the entry of the . . . plea.' " *Id. (quoting United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212-13 (10th. Cir. 2008)). A defendant's subjective understanding "is neither a

promise nor a plea bargain." *Laycock v. New Mexico*, 880 F.2d 1184, 1186 (10th Cir. 1989).

According to Plaintiff, application of the lifetime sex offender registration requirement violates a promise of ten-year registration contained in his plea agreement. He seeks specific enforcement of this alleged promise and attempts to distinguish this case from the Tenth Circuit's decision in *Cunningham v. Diesslin*, 92 F.3d 1054 (10th Cir. 1996). The petitioner in *Cunningham* pleaded guilty to first-degree sexual assault in 1982. *Id.* at 1056. At that time, the Colorado State Parole Board ("Parole Board") interpreted a statutory mandatory parole requirement to apply to virtually all inmates, including those in the petitioner's situation. *Id.* In 1989, however, the Parole Board changed its interpretation of the mandatory parole requirement and determined that individuals sentenced for any sex offense were not subject to mandatory parole. *Id.* at 1057.

On appeal to the Tenth Circuit, the petitioner argued, *inter alia*, that the sentencing term of his plea bargain should be specifically enforced because all of the parties understood that mandatory parole would apply to his sentence at the time of the plea. *Id.* at 1058. The Court of Appeals rejected the petitioner's argument because application of mandatory parole to the petitioner's sentence was "neither an explicit nor an implicit part of the plea agreement." *Id.* at 1059. The fact that the petitioner, the prosecution, and the trial court all understood mandatory parole to apply to the petitioner's sentence was

irrelevant because this understanding was never made part of the plea agreement. *Id.* at 1060. Moreover, even though the petitioner's attorney informed him that mandatory parole would apply to his sentence, the Court explained that such a statement could not be binding because it was not a part of the plea agreement. *Id.*

Plaintiff argues that this case differs from *Cunningham* because ten-year registration *was* part of his plea agreement. Because the plea agreement does not expressly mention the length of Plaintiff's registration obligation but merely contains a provision requiring Plaintiff to comply with the Act, he contends that "ten year registration was both an implicit, statutory promise made by the state, via the plea agreement, and a 'reasonable understanding' for Plaintiff to have formed, after reading plea documents and relying upon his attorney's explanation of his obligations." (Pl.'s Mot., Dkt. No. 26, p. 7.) According to Plaintiff, the version of the Act in effect at the time of his plea created an implicit promise regarding the length of time he would be required to register by prescribing a ten-year registration period. *Id.* He uses the term "promise" to refer solely to the language of the former statute and admits that no person made any explicit promise related to the length of his registration obligation. (Pl.'s Reply, Dkt. No. 30, pp. 6-7.)

The Court finds that Plaintiff's argument is without merit for two reasons. First, no provision of the Act expressly or implicitly promised that the

registration terms would remain static. The Legislature has broad power to amend existing legislation and was free to alter the statute's registration requirements at any time. *See Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 22, 184 P.3d 546, 553; 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 22:2 (6th ed.2002) ("Existing legislation is subject to amendment in any manner consistent with constitutional limitations."). Thus, the statute's registration period as it existed at the time of Plaintiff's plea did not, without more, constitute a promise about the length of time Plaintiff would ultimately be required to register. As in *Cunningham*, the term Plaintiff wants specifically enforced was simply not part of the plea agreement.

Second, the Act creates an independent statutory duty to register that may not be modified or abrogated as part of a plea agreement or sentence. *See* 57 Okla. Stat. § 583(A) ("Any person who becomes subject to the provisions of the Sex Offenders Registration Act on or after November 1, 1989, *shall register*. . . .") (emphasis added). The use of the word "shall" signals that registration is mandatory rather than discretionary. *Sneed v. Sneed*, 1978 OK 138, ¶ 3, 585 P.2d 1363, 1364. Because the duty to register as a sex offender arises by legislative mandate, it is not negotiable as part of a plea agreement. *See Alabama v. Goldberg*, 819 So.2d 123, 126 (Ala. Crim. App. 2001); *California v. Hernandez*, 83 Cal. Rptr. 3d 29, 33 (Cal. Ct. App. 2008); *N.M. v. Brothers*, 59 P.3d

1268, 1274 (N.M. Ct. App. 2002); *Wash. v. Acheson*, 877 P.2d 217, 219-20 (Wash. Ct. App. 1994). The prosecuting attorney lacked the power to make any enforceable promise regarding Plaintiff's obligations under the Act because Plaintiff became subject to the statute's mandatory registration requirement and any subsequent modifications thereof solely by virtue of his status as a sex offender. *See* 57 Okla. Stat. §§ 582, 583.

Moreover, an Oklahoma court sentencing a criminal defendant is limited to the powers articulated by statute. *See Nevious v. State*, 1989 OK CR 13, ¶ 6, 774 P.2d 1070, 1071 (noting that a court lacks the power to impose a penalty without authorization from the Legislature); *Williams v. State*, 1985 OK CR 167, ¶ 7, 711 P.2d 116, 118 (holding that the trial court lacked jurisdiction to assess court-appointed attorney fees against a convicted defendant in the absence of specific statutory authorization). As Defendant correctly points out in his brief, nothing in the Oklahoma statute setting forth the powers of a sentencing court grants a court the power to exempt a defendant from sex offender registration or to define the length of time an individual must register. *See* 22 Okla. Stat. § 991a. Thus, the sentencing court could not guarantee that Plaintiff would be required to register for any specific amount of time, and any such promise that may have arisen when the court accepted the plea agreement would be unenforceable.

Plaintiff places emphasis on the fact that he relied on his attorney's explanation that he would

only be required to register as a sex offender for ten years. He contends that he would not have pleaded *nolo contendere* to the charge of sexual battery if he knew he would be required to register for life. Defendant disputes the fact of Plaintiff's reliance and claims that Plaintiff pleaded because he thought he might be convicted if tried, not because of the ten-year registration requirement. While this raises a genuine factual dispute, the Court finds that this does not preclude summary judgment because Plaintiff's reliance is immaterial to his breach of plea agreement claim. The Tenth Circuit Court of Appeals in *Cunningham,* when addressing such a claim, attached no significance to the fact that the petitioner's counsel erroneously advised him about the length of his sentence.[2] Instead, the Court noted that "any statement by the petitioner's attorney . . . does not bind the court unless it is a part of the plea agreement." *Id.* at 1060. Therefore, because ten-year registration was not a part of Plaintiff's plea agreement, any statements made by his attorney regarding the length of his registration obligation are simply

[2] The petitioner in *Cunningham* also raised a claim that he did not enter his plea knowingly and voluntarily because his attorney led him to believe that mandatory parole was part of his plea agreement. In the context of this claim only, the Tenth Circuit noted that a defendant's misunderstanding of his plea agreement may render his plea constitutionally infirm when that misunderstanding was based upon a representation by defense counsel and it affected the defendant's decision with respect to the plea.

irrelevant to Plaintiff's breach of plea agreement claim.

Even if Plaintiff's reliance were material, it would not change the outcome. Such reliance on his attorney's erroneous advice is not alone enough for Plaintiff to prevail under well-established Tenth Circuit law. *See Bush v. Neet*, 400 F.3d 849, 852-53 (10th Cir. 2005). "The defendant 'assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.'" *Id.* at 852 (*quoting McMann v. Richardson*, 397 U.S. 759, 774 (1970)). Consequently, Plaintiff must prove not only that he relied on his counsel's mistaken advice, but also that his counsel was constitutionally ineffective in rendering the advice. *Id.* at 853. Although Plaintiff might have pleaded differently had he known the registration requirement would be altered at a later date, "'he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel'" sufficient to make out a constitutional claim of ineffective assistance of counsel. *Id.* at 853 (*quoting McMann*, 397 U.S. at 774). Plaintiff does not contend that his counsel was constitutionally ineffective in relying on the then-current sex offender registration terms when he explained Plaintiff's registration obligations. Therefore, Plaintiff's reliance would not entitle him to relief even if it were material to his breach of plea agreement claim.

B. Plaintiff's *Ex Post Facto* Claim[3]

Article I, Section 9, Clause 3 of the U.S. Constitution provides that "[n]o . . . ex post facto Law shall be passed." The United States Supreme Court laid out a two-part test for determining whether a sex offender registration law constitutes retroactive punishment in violation of this provision:

> We must ascertain whether the legislature meant the statute to establish "civil" proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it "civil." Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform

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[3] Plaintiff also challenges the Act under Oklahoma's *ex post facto* clause of the Oklahoma Constitution. Plaintiff does not cite, nor is the Court able to find, any case indicating that the Oklahoma clause is interpreted differently than the Federal clause. In fact, when parties raise challenges under both clauses, the Oklahoma Court of Criminal Appeals conducts a single analysis and follows U.S. Supreme Court precedent. *See, e.g., James v. State*, 2009 OK CR 8, ¶¶ 5-6, 204 P.3d 793, 795-96; *Coddington v. State*, 2006 OK CR 34, ¶¶ 59-60, 142 P.3d 437, 453-54; *Allen v. State*, 1991 OK CR 35, ¶ 18, 821 P.2d 371, 375. Accordingly, the Court combines the analysis of both the state and federal provisions.

> what has been denominated a civil remedy into a criminal penalty.

Smith v. Doe, 538 U.S. 84, 92 (2003) (citations and internal quotation marks omitted). With respect to the legislative intent prong of the test, "[w]hether a statutory scheme is civil or criminal 'is first of all a question statutory construction.' We consider the statute's text and its structure to determine the legislative objective." *Id.* (citations omitted).

With respect to the effects prong of the test, courts assessing the constitutionality of a sex offender registration statute should consider the following factors:

> whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Smith, 538 U.S. at 97. These factors are "'neither exhaustive nor dispositive,' but are 'useful guideposts.'" *Id.* at 97 (citations omitted). Applying these principles, the Court finds that the Act does not run afoul of the *Ex Post Facto* Clause.

1. Legislative Intent

The best evidence of legislative intent is the statutory text itself. *See id.* at 93. As did the Alaska

Legislature, *see id.*, the Oklahoma Legislature expressly identified public safety as the Act's primary objective:

> The Legislature finds that sex offenders . . . pose a high risk of re-offending after release from custody. The Legislature further finds that the privacy interest of persons adjudicated guilty of these crimes is less important than the state's interest in *public safety*. The Legislature additionally finds that a system of registration will permit law enforcement officials to identify and alert the public when necessary for *protecting the public safety*.

57 Okla. Stat. § 581(B) (emphasis added). Protecting the public by placing restrictions on sex offenders is "'a legitimate nonpunitive governmental objective and has been historically so regarded.'" *Smith,* 538 U.S. at 93 (*quoting Kansas v. Hendricks,* 521 U.S. 346, 363 (1997)). Thus, the legislature's stated purpose indicates an intent to establish a civil regulatory scheme rather than a punishment.

In addition to the legislature's stated objective, "[o]ther formal attributes of [the] legislative enactment," including "the manner of its codification[,] . . . are probative of the legislature's intent." *Id.* at 94. Plaintiff argues that the Act's codification in Title 57, "Prisons and Reformatories," evidences a punitive intent because "'Prisons and Reformatories' are penal terms, inasmuch as they are the classic penal institutions." (Pl.'s Reply, Dkt. No. 30, p. 9.) However, "[t]he location and labels of a statutory provision do

not by themselves transform a civil remedy into a criminal one." 538 U.S. at 94. Other courts to address this issue have found such codification insufficient to override the legislature's stated objective. *See Smith*, 538 U.S. at 95; *Hatton v. Bonner*, 356 F.3d 955, 962-63 (9th Cir. 2004).

The Court similarly finds that the location of the Act in Title 57, "Prisons and Reformatories," does not render the legislative punitive. Title 57 contains several provisions that do not involve criminal punishment. *See, e.g.*, 57 Okla. Stat. § 1 (directing county commissioners to inspect jails); *id.* § 69 (providing for the service of meals to county jail personnel); *id.* § 332.1 (authorizing the Pardon and Parole Board to employ professional investigators and clerical and administrative personnel); *id.* § 623 (authorizing the Department of Corrections to operate on-site primary medical treatment programs). Because "considerable deference must be accorded to the intent as the legislature has stated it," *Smith*, 538 U.S. at 93, codification of the Act in "Prisons and Reformatories" is insufficient to override the legislature's stated objective. Accordingly, the Court finds that the Oklahoma Legislature intended to enact a nonpunitive civil regulatory scheme.

2. Effects

Having determined that the legislature's intent was nonpunitive, the Court must now consider the effects of the Act using the *Mendoza-Martinez*[4] factors. *Id.* at 97. Only the "clearest proof" will suffice to show that the Act "is so punitive in . . . effect as to overcome the legislature's civil intent." *Femedeer v. Haun,* 227 F.3d 1244, 1249 (10th Cir. 2000); *see Smith,* 538 U.S. at 92.

a. Historically Regarded as Punishment

The Court first asks whether the registration and notification provisions of the Act have historically been regarded as punishment. *See Smith,* 538 U.S. at 97. In *Smith,* the Supreme Court considered and rejected an analogy between the notification provisions of Alaska's Act – including the provision allowing the posting of sex offender information on the Internet – and early colonial shaming punishments. *Id.* at 97-99. The Court stated that, in contrast to colonial shaming punishments where the offender was held up before the community for ridicule, the stigma from Alaska's law "results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id.* at 98. The Court noted that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental

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[4] *See Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963).

objective as punishment." *Id.* Additionally, the Court observed that the process of looking up information in the sex offender registry "is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality" because an individual "must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information." *Id.* at 99; *see also Femedeer,* 227 F.3d at 1251 ("Under Utah's law, registry information is made widely available, but it is not broadcast in a manner approaching the historical examples of public shaming. Interested individuals must still make an affirmative effort to retrieve the information.").

Plaintiff contends that Oklahoma's statute differs from Alaska's in a significant way because it *does* force an offender to appear in public with a "visible badge of past criminality." (Pl.'s Reply, Dkt. No. 30, p. 10.) Specifically, 47 Okla. Stat. § 6-111(D)(1) requires the Department of Public Safety to issue a driver's license bearing the words "Sex Offender" to a convicted sex offender who is designated by the Department of Corrections as "an aggravated or habitual offender." The Court will not consider whether 47 Okla. Stat. § 6-111(D)(1) is punitive in nature because the statute is not part of the Act, which is codified at 57 Okla. Stat. § 581 *et seq.* Rather, 47 Okla. Stat. § 6-111(D)(1) is a distinct provision in the motor vehicle code that Plaintiff has not challenged in his complaint.

Because Plaintiff's argument with respect to 47 Okla. Stat. § 6-111(D)(1) fails, the analysis in *Smith* applies with equal force to the Act. The statute does not hold the offender up before the community for public ridicule. Instead, it provides for the dissemination of truthful information in furtherance of a legitimate governmental objective. Therefore, the Court finds that this factor weighs against finding the statute punitive.

b. Promotes the Traditional Aims of Punishment

Smith next requires the Court to consider whether the Act promotes the traditional aims of punishment: deterrence and retribution. 538 U.S. at 102. In *Smith,* the Supreme Court rejected the proposition that a deterrent effect alone makes the statute punitive. *Id.* Instead, it reasoned that "[a]ny number of governmental programs might deter crime without imposing punishment," and "'[t]o hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.'" *Id. (quoting Hudson v. United States,* 522 U.S. 93, 105 (1997)). The Court also declined to find Alaska's Act retributive even though "'the length of the [registration obligation] appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed.'" *Id.* at 102 (*quoting Doe I v. Otte,* 259 F.3d 979, 990 (9th Cir. 2001)). The Court stated that the length of the registration obligation, although tied

to the seriousness of an offender's wrongdoing, is "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.*

Plaintiff here points to nothing in the Act that affects the applicability of the Supreme Court's analysis in *Smith*. Accordingly, the Court finds that this factor does not make the statute punitive in effect.

c. Affirmative Disability or Restraint

This Court next asks whether the Act subjects sex offenders to an affirmative disability or restraint. *Smith*, 538 U.S. at 99. Analyzing the Alaska Act in *Smith*, the Supreme Court observed that "[t]he Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Id.* at 100. The Court considered it significant that "[t]he Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Id.* Furthermore, the Court declined to recognize a parallel between sex offender registration and probation or supervised release with respect to the restraint imposed. *Id.* at 101. The Court reasoned that "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction," whereas "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* Accordingly, the Court ultimately

determined that "the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause." *Id.* at 102.

Plaintiff argues that analysis of the Act should yield the opposite result because the Act "severely limits where registrants may live." (Pl.'s Reply, Dkt. No. 30, p. 10.) Plaintiff is correct that the Act contains a residency restriction not present in the Alaska statute upheld in *Smith*. Specifically, 57 Okla. Stat. § 590(A) makes it unlawful for a registered sex offender to reside within 2,000 feet of a school, other educational institution, playground, park, or licensed child care center. This provision does not require the sex offender to move if a new daycare or park is established within the 2,000-foot radius, 57 Okla. Stat. § 590(A), nor does it require an individual to sell or otherwise dispose of any real property owned prior to a conviction for a sex offense. *Id.* § 590(B).

Placing restrictions on where a person may live undoubtedly imposes an affirmative disability or restraint. *See Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005). This fact, however, does not automatically transform a civil scheme into a punishment. In *Kansas v. Hendricks*, the Supreme Court held that the civil commitment of mentally ill sex offenders does not constitute punishment, even though it imposes an extreme disability and restraint on those committed. 521 U.S. 346, 363 (1997). The Court reached this conclusion because it considered the restraint in relation to the legislature's legitimate nonpunitive

objective – protecting the public from mentally unstable offenders. *Id.* In a more recent case, the Eighth Circuit addressed the constitutionality of an Iowa sex offender registration law featuring a residency restriction and noted that a residency restriction is "certainly less disabling . . . than the civil commitment scheme at issue in *Hendricks*, which permitted complete confinement of affected persons." *Miller*, 405 F.3d at 721. The court then concluded that *Smith* and *Hendricks* stand for the proposition that the presence of an affirmative disability or restraint "ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose." *Id.* The Eighth Circuit ultimately upheld the Iowa statute based on the law's relationship to its nonpunitive purpose. *Id.* at 723.

This Court finds the Eighth Circuit's reasoning persuasive. Oklahoma's residency restriction, like Iowa's, cannot be considered more disabling than civil commitment even though it imposes an affirmative disability or restraint. Thus, standing alone, it does not make the statute punitive. The restraint imposed must be considered in light of remaining *Mendoza-Martinez* factors to determine whether the Act is punitive.[5]

[5] Another federal court in Oklahoma found that Oklahoma's residency restriction probably was not punitive even though it forced a sex offender to move out of his wife's home due to the home's location near a school. *Graham v. Henry*, No. 06 CV 381

(Continued on following page)

d. Rational Connection to a Nonpunitive Purpose

Whether the Act has a rational connection to a nonpunitive purpose is the "most significant factor" in the *Mendoza-Martinez* framework. *Smith*, 538 U.S. at 102; *Miller*, 405 F.3d at 721. A statute need not be "narrowly drawn" to accomplish its legitimate public safety objective in order to satisfy the "rational connection" requirement. *Smith*, 538 U.S. at 103. As the Supreme Court explained in *Smith*, "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* The Act unquestionably has a rational connection to a nonpunitive purpose. The legislature could reasonably conclude that placing certain restrictions on convicted sex offenders advances the goal of protecting the public where "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Id.* (*citing McKune v. Lile*, 536 U.S. 24, 34 (2002)).

e. Excessiveness in Relation to Nonpunitive Purpose

The final *Mendoza-Martinez* factor this Court must consider is whether the regulatory scheme is

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TCK FHM, 2006 WL 2645130 (N.D. Okla. Sept. 14, 2006) (refusing to grant a sex offender a preliminary injunction in part because he was unlikely to be able to show that the residency restriction was punitive).

excessive in relation to its nonpunitive purpose. *Smith*, 538 U.S. at 97. The Supreme Court in *Smith* explained the limited nature of this inquiry:

> The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are *reasonable* in light of the nonpunitive objective.

Id. at 105 (emphasis added). Requiring sex offenders to register and limiting where they may live are *reasonable* means of protecting public safety. Although the Act may not represent the best choice among all possible alternatives for protecting the public against the high risk of recidivism posed by sex offenders, reasonableness is all that the *Ex Post Facto* Clause requires.

Nonetheless, Plaintiff argues that labeling him as currently dangerous and requiring him to register for life based solely on his past conviction does not square with the legislature's public safety purpose. (Pl.'s Reply, Dkt. No. 30, p. 10.) The essence of Plaintiff's argument is that the absence of an individualized risk assessment mechanism renders the statute excessive. The Supreme Court already rejected this argument in *Smith*, noting that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular

regulatory consequences." *Id.* at 103. The Court found that the Alaska legislature could reasonably conclude that "a conviction for a sex offense provides evidence of substantial risk of recidivism" and, on that basis alone, require all sex offenders to register without converting the statute into a punishment. *Id.* The Court explained that "[i]n the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause." *Id.* at 104. These same principles apply in this case, and Plaintiff's argument therefore must fail.

f. Conclusion

Having considered the relevant *Mendoza-Martinez* factors, the Court finds that Plaintiff "cannot show, much less by the clearest proof, that the effects of the law negate [Oklahoma's] intention to establish a civil regulatory scheme." *Id.* at 105. Because the Act is nonpunitive, its retroactive application does not violate the *Ex Post Facto* Clause.

C. Plaintiff's Due Process Claim

1. Procedural Due Process

Plaintiff contends that application of the lifetime registration requirement violates his Fourteenth Amendment right to procedural due process. The Act

directs ODOC to develop or select a screening tool to determine the level of risk the offender poses to the community by assigning a certain number of points for "each of the various factors." 57 Okla. Stat. § 582.5(C). The screening tool chosen by the committee is the "Sex Offender Registration Level Assignment Tool," DOC 020307E, Nov. 1, 2007. This tool consists of a chart listing the different crimes requiring registration as a sex offender and assigning one to three points for each crime. The number of points assigned to an offender, based solely on the offense of conviction, then constitutes that individual's risk level. The duration requirement for registration, along with a variety of other requirements, depends upon the level of classification assigned to the offender. ODOC classified Plaintiff as a level III offender, thereby defining him as one who "poses a serious danger to the community and [who] will continue to engage in criminal sexual conduct." 57 Okla. Stat. § 582.5(C)(3). Plaintiff contends that this classification was made without affording him any sort of hearing to determine whether he posed a future danger, thereby denying him procedural due process.

To determine whether Plaintiff was denied procedural due process, the Court must engage in a two-part inquiry: "'(1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process.'" *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 577 (10th Cir.

1996) (*quoting Hatfield v. Bd. of County Comm'rs*, 52 F.3d 858, 862 (10th Cir. 1995)). Plaintiff asserts that his liberty interest in his good name and reputation are at stake due to Defendant's classification of him as a level III sex offender. In order for this deprivation to give rise to due process protections, Plaintiff must meet the "stigma plus" standard, which requires him to show that "(1) the government made a statement about him . . . that is sufficiently derogatory to injure his . . . reputation, that is capable of being proved false, and that he . . . asserts is false, and (2) [he] experienced some governmentally imposed burden that 'significantly altered [his] . . . status as a matter of state law.'" *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004) (citation omitted).

The Court finds that Plaintiff possessed a liberty interest in his good name and reputation which required due process protections. Based on the statutory language found in the Act, it is clear that by classifying Plaintiff as a level III sex offender, ODOC is making the statement that he "poses a serious danger to the community and will continue to engage in criminal sexual conduct." 57 Okla. Stat. § 582.5(C)(3).[6]

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[6] Defendant argues that such a statement is not made, relying on the following language found on the ODOC website:

> The Oklahoma Department of Corrections has not considered or assessed the specific risk of re-offense with regard to any individual prior to his or her inclusion on this web site and has made no determination that any individual included on the web site is

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Plaintiff is capable of proving this statement false, and he clearly asserts that it is false. Additionally, Plaintiff's classification as a level III sex offender requires him to register for life, verify his address every ninety days, and abide by stringent residency restrictions. It is clear to the Court that these constitute a governmentally-imposed burden that changes Plaintiff's status as a matter of law.

The next step, then, is for the Court to determine whether Plaintiff has been afforded an appropriate level of process. At a minimum, the Due Process Clause requires that Plaintiff be given notice of the potential deprivation of his liberty interest along with the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citation omitted). It is undisputed that Plaintiff was given proper notice. The only question remaining, therefore, is whether Plaintiff was given the opportunity for a meaningful hearing. By its plain language, the Act itself provides very

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> currently dangerous. Individuals on the registry are included solely by virtue of their conviction record and state law. The primary purpose of providing this information is to make the information easily available and accessible. In Oklahoma sex offenders are required to register with the Department of Corrections and with their local law enforcement agency.

Regardless of ODOC's statements to the contrary, the Oklahoma state legislature, as evident from the plain language of the Act, is making the statement that level III offenders, such as Plaintiff, pose a serious danger to the community.

little, if any, process to offenders in Plaintiff's situation. No hearing is provided prior to classifying an offender sentenced before November 1, 2007, and there is no specific provision detailing how such an offender may obtain review of his or her classification. The Act does provide that the risk assessment committee, the Department of Corrections, or a court may override a classification if it is determined that it does not accurately predict the risk that the offender poses to the community. 57 Okla. Stat. § 582.5(D)(1). However, according to ODOC's operations memoranda, an offender's classification may only be increased to a higher risk level, not reduced to a lower one. *See* Oklahoma Department of Corrections Sex and Violent Crime Offender Registration, No. OP-020307, at (I)(B), Nov. 1, 2007. Therefore the Act, standing alone, does not provide sufficient process to meet the standards of the Fourteenth Amendment.

Defendant argues, however, that sex offenders may utilize the ODOC internal grievance process to obtain review of their classifications. This assertion finds support in the operations memoranda concerning sex offenders issued by ODOC. *See id.* at (IV)(G). This document indicates that "[a]n offender may address issues regarding registration requirements in accordance with OP-090124 entitled 'Inmate Offender Grievance Process.'" *Id.* A review of the attached grievance process indicates that, if a complaint is not resolved through informal means, an offender may submit a grievance form to the reviewing authority. *See* Oklahoma Department of Corrections Inmate/

Offender Grievance, No. OP-090124, at IV-VII, May 3, 2007. The reviewing authority must respond to the grievance within a specified period of time and, if still unsatisfied, the offender may appeal to the administrative review authority. *Id.* At no point in time is an offender provided with an adjudicative hearing to determine whether he or she in fact poses a risk to the community.

As a general rule, "the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch,* 494 U.S. 113, 127 (1990). However, "in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process." *Id.* at 132 (citation omitted). In order to determine whether a particular process is constitutionally adequate, courts are instructed to consider the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The Court finds that the process provided to Plaintiff by ODOC does not meet the minimum requirements of due process. Plaintiff's interests here are substantial. First, he has an interest in not being publicly classified as someone who "poses a serious danger to the community and [who] will continue to engage in criminal sexual conduct." This is a serious interest, and one that cannot be fully remedied through the use of a post-deprivation process. Additionally, Plaintiff has an interest in registering for a substantially shorter period of time and verifying his address with the authorities much less frequently. The risk of an erroneous deprivation of Plaintiff's interests is high when his only procedural safeguard is a post-deprivation grievance process through ODOC, particularly when ODOC appears to treat his grievance as falling within the Governmental Tort Claims Act. (*See* Pl.'s Reply, Dkt. No. 30, Ex. 7.) While the State has a strong interest in ensuring the prompt and efficient registration of sex offenders, that interest will not be unduly burdened or hindered by requiring a predeprivation hearing to prove an offender's future dangerousness.

Defendant contends that this result is foreclosed by the Supreme Court decision in *Conn. Dep't. of Pub. Safety v. Doe*, 538 U.S. 1 (2003). There, the Supreme Court considered whether Connecticut's Sex Offender Registration Act requiring public disclosure of the state's offender registry deprived offenders of due process because they were not afforded a predeprivation hearing to determine whether they were likely

to be "currently dangerous." The Court found a hearing was unnecessary because "current dangerousness" was not material to the state's statutory scheme. Rather, the state mandated registration based solely upon the offense of conviction and therefore made no determination that an offender included in the register was currently dangerous. Defendant argues that the same result should obtain here because the Sex Offender Screening Tool utilized by ODOC classifies offenders based solely on their conviction, thereby rendering their current or future dangerousness immaterial. It appears that Defendant is ignoring, or at best misinterpreting, the clear mandate of 57 Okla. Stat. § 582.5 to use the conviction as the starting point to assess future dangerousness, not the sole factor. In any event, the Oklahoma legislature has made a determination that the different levels of risk indicate whether an offender poses a danger to the community and is likely to continue engaging in criminal sexual conduct. Because the legislature has determined that current or future dangerousness is material to the statutory scheme, Plaintiff is entitled to a predeprivation hearing to determine whether he poses a current or future danger.

The statute appears to provide some form of predeprivation process to those offenders who are incarcerated or who were sentenced after November 1, 2007, when the amendments to the Act became effective. Prior to an inmate's release from a correctional facility, ODOC conducts the risk assessment

and assigns a risk level to the offender. As set forth in ODOC's operations memoranda, inmates may utilize the inmate grievance process to contest their registration requirements under the Act. *See* Oklahoma Department of Corrections Sex and Violent Crime Offender Registration, No. OP-020307, at (IV)(G), Nov. 1, 2007; Oklahoma Department of Corrections Inmate/Offender Grievance, No. OP-090124, at IV-VII, May 3, 2007. For those offenders sentenced after the effective date of the current version of the Act, the court is instructed at sentencing to determine the offender's risk level and notify the offender of his or her duty to register pursuant to the Act. *See* 57 Okla. Stat. § 582.2(B). This provides an opportunity for the offender to be heard on the issue of future dangerousness, thereby satisfying procedural due process. However, those offenders in Plaintiff's situation, who were already registered as sex offenders prior to the effective date of the Act's amendments, appear to have received absolutely no predeprivation process, which the Court holds is a constitutional requirement. Accordingly, as applied to Plaintiff, the Act violates the Due Process Clause of the Fourteenth Amendment. Plaintiff is entitled to a hearing regarding his current dangerousness before he is classified as a level I, II, or III offender.

2. Substantive Due Process

Finally, Plaintiff contends that the classification system by which he was deemed a level III offender constitutes arbitrary state action, thereby violating

his substantive due process rights. As discussed above, Plaintiff has a liberty interest in his good name and reputation that requires due process protection. This interest does not constitute a "fundamental right" that is "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008) (citation omitted). Therefore, the Court must apply the rational basis test to determine whether the Act is constitutional. *Murphy v. Matheson*, 742 F.2d 564, 575 (10th Cir. 1984) (noting that "[u]nless a state law trammels fundamental personal rights, we are to presume that state legislatures have acted within their constitutional power and are to require only that the law 'bears a reasonable relation to the State's legitimate purpose.'") (citation omitted).

The Oklahoma legislature undoubtedly has a legitimate interest in protecting the public and providing sufficient information to enable citizens to determine whether a particular sex offender poses a continuing danger to the community. The Act's provision that classifies sex offenders based on their offenses of conviction is rationally related to that governmental interest. The legislature has determined that certain sex offenses are worse than others and tend to provide a stronger indication that an offender poses a danger to the community, and the Court finds that such a classification scheme is rationally related to the State's interest. Accordingly, Plaintiff has not demonstrated a violation of substantive due process.

Conclusion

For the reasons set forth more fully herein, Plaintiff's Motion for Summary Judgment (Dkt. No. 26) is GRANTED. The Court finds that application of 57 Okla. Stat. § 581 et seq. to Plaintiff, who was convicted prior to the November 1, 2007, amendments, violates the Due Process Clause of the United States Constitution. Plaintiff is entitled to a predeprivation hearing prior to being classified pursuant to the Act. Additionally, Intervenor's Motion to Dismiss (Dkt. No. 27) is GRANTED.

IT IS SO ORDERED this 20th day of May, 2009.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LELAND J. GAUTIER, an individual, Plaintiff, vs. JUSTIN JONES, in his official capacity, Director, Department of Corrections of the State of Oklahoma, Defendant.	)	No. CIV-08-445-C

JUDGMENT

(Filed May 20, 2009)

Upon consideration of the pleadings herein, and in accordance with the Court's Memorandum Opinion issued in this case, the Court finds that Plaintiff's Motion for Summary Judgment should be granted. Application of the Oklahoma Sex Offender Registration Act, Okla. Stat. tit. 57 § 581, et seq., to Plaintiff, absent a hearing regarding his current dangerousness, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendant is enjoined from enforcing its provisions against Plaintiff unless and until he is provided with such a hearing.

IT IS SO ORDERED this 20th day of May, 2009.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LELAND J. GAUTIER,
an individual,

Plaintiff-Appellee,

v.

JUSTIN JONES, in his official capacity, Director, Department of Corrections of the State of Oklahoma,

Defendant-Appellant.

No. 09-6123

ORDER

(Filed Mar. 2, 2010)

Before **KELLY, PORFILIO, and O'BRIEN,** Circuit Judges.

Appellee, Leland J. Gautier's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Okla. Stat. tit. 57 § 582.5 (2009)

Superceded
Effective: 11/01/2009

A. The Department of Corrections shall establish a risk assessment review committee composed of at least five members, each of whom is a state employee whose service on the review committee is in addition to the regular duties of the employee. The review committee, to the extent feasible, should include the following:

1. One member having experience in law enforcement;

2. One member having experience as a sex offender treatment provider;

3. One member having experience working with victims of sex offenses; and

4. One member who is a social worker with a graduate degree in social work.

B. The risk assessment review committee functions in an oversight capacity. The committee shall:

1. Develop or select from among existing tools, a sex offender screening tool to be used in determining the level of risk of a person subject to registration pursuant to the provisions of the Sex Offenders Registration Act;

2. Ensure that staff is trained on the use of the screening tool;

3. Monitor the use of the screening tool in the state; and

4. Analyze other screening tools as they become available and revise or replace the existing screening tool, if warranted.

C. The sex offender screening tool must use an objective point system under which a person is assigned a designated number of points for each of the various factors. The offense for which the person is convicted shall serve as the basis for the minimum numeric risk level assigned to the person. In developing or selecting the sex offender screening tool, the risk assessment review committee shall use or shall select a screening tool that may be adapted to use the following general guidelines:

1. Level one (low): a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;

2. Level two (moderate): a designated range of points on the sex offender screening tool indicating that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and

3. Level three (high): a designated range of points on the sex offender screening tool indicating that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.

D. The risk assessment review committee, the Department of Corrections, or a court may override a risk level only if the entity:

1. Believes that the risk level assessed is not an accurate prediction of the risk the offender poses to the community; and

2. Documents the reason for the override in the case file of the offender.

E. All records and files relating to a person for whom a court, or the Department of Corrections is required under this act to determine a level of risk, shall be released to the court or the Department of Corrections as appropriate, for the purpose of determining the risk level of the person.

F. Upon receiving registration information from a local law enforcement agency of a person who has entered this state and who has registered as a sex offender, as required in Section 583 of this title, the risk assessment review committee shall review the registration information and make a determination of the numeric risk level of the person using the sex offender screening tool. The risk assessment review committee shall provide written notification to the person and the local law enforcement agency of the numeric risk level that has been assigned to the person.

G. The provisions of the Oklahoma Open Meeting Act do not apply to a meeting of the risk assessment review committee.

Okla. Stat. tit. 57 § 582.5

A. The Department of Corrections shall establish a sex offender level assignment committee composed of at least five members, each of whom is a state employee whose service on the committee is in addition to the regular duties of the employee. The committee, to the extent feasible, should include the following:

1. One member having experience in law enforcement;

2. One member having experience as a sex offender treatment provider;

3. One member having experience working with victims of sex offenses; and

4. One member who is a social worker with a graduate degree in social work.

B. The sex offender level assignment committee functions in an oversight capacity. The committee shall determine, based on federal law, the level a person subject to registration pursuant to the provisions of the Sex Offenders Registration Act shall be placed on.

C. The offense for which the person is convicted shall serve as the basis for the level assigned to the person. In selecting the level assignment, the sex offender level assignment committee shall use the following general guidelines:

1. Level one (low): a designation that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;

2. Level two (moderate): a designation that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and

3. Level three (high): a designation that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.

D. The sex offender level assignment committee, the Department of Corrections, or a court may override and increase the level assignment only if the entity:

1. Believes that the level assignment assessed is not an accurate prediction of the risk the offender poses to the community; and

2. Documents the reason for the override in the case file of the offender.

Provided, in no event shall the sex offender level assignment committee, the Department of Corrections, or a court override and reduce a level assigned to an offender as provided in subsection C of this section.

E. All records and files relating to a person for whom a court, or the Department of Corrections is required under this act to determine a level assignment, shall be released to the court or the Department of Corrections as appropriate, for the

purpose of determining the level assignment of the person.

F. Upon receiving registration information from a local law enforcement agency of a person who has entered this state and who has registered as a sex offender, as required in Section 583 of this title, the sex offender level assignment committee shall review the registration information and make a determination of the level assignment of the person. The Department of Corrections Sex Offender Registry Unit shall provide written notification to the person and the local law enforcement agency of the level assignment that has been assigned to the person.

G. The provisions of the Oklahoma Open Meeting Act do not apply to a meeting of the sex offender level assignment committee.

Okla. Stat. tit. 57 § 583 (2009)

Superceded
Effective: 11/01/2009

A. Any person who becomes subject to the provisions of the Sex Offenders Registration Act on or after November 1, 1989, shall register, in person, as follows:

1. With the Department of Corrections within three (3) business days of being convicted or receiving a suspended sentence or any probationary term, including a deferred sentence imposed in violation of

subsection G of Section 991c of Title 22 of the Oklahoma Statutes, if the person is not incarcerated, or not less than three (3) business days prior to the release of the person from a correctional institution, except as provided in subsection B of this section;

2. With the local law enforcement authority having jurisdiction in the area where the person resides or intends to reside for seven (7) consecutive days or longer, calculated beginning with the first day. The registration is required within three (3) days after entering the jurisdiction of the law enforcement authority, and

3. With the Department of Corrections and the local law enforcement authority no less than three (3) business days prior to abandoning or moving from the address of the previous registration.

For purposes of this section, "local law enforcement authority" means:

a. the municipal police department, if the person resides or intends to reside or stay within the jurisdiction of any municipality of this state, or

b. the county sheriff, if the person resides or intends to reside or stay at any place outside the jurisdiction of any municipality within this state, and

c. the police or security department of any institution of higher learning within this state if the person:

(1) enrolls as a full-time or part-time student,

(2) is a full-time or part-time employee at an institution of higher learning, or

(3) resides or intends to reside or stay on any property owned or controlled by the institution of higher learning.

B. Any person who has been convicted of an offense or received a deferred judgment for an offense in another jurisdiction, which offense if committed or attempted in this state, would have been punishable as one or more of the offenses listed in Section 582 of this title and who enters this state on or after November 1, 1989, shall register, in person, as follows:

1. With the Department of Corrections when the person enters and intends to be in the state for any purpose for five (5) consecutive days or longer, calculated beginning with the first day, has any type of full-time or part-time employment, with or without compensation for more than five (5) cumulative days in any sixty-day period, or is enrolled as a full-time or part-time student within this state. Such registration is required within two (2) days after entering the state;

2. With the local law enforcement authority having jurisdiction in the area where the person intends to reside or to stay for five (5) consecutive days or longer, calculated beginning with the first day, has any type of full-time or part-time employment, with or

without compensation for more than five (5) cumulative days in any sixty-day period, or is enrolled as a full-time or part-time student within this state. The registration is required with local law enforcement within two (2) days after entering the jurisdiction of the law enforcement authority; and

3. With the Department of Corrections and the local law enforcement authority no less than three (3) business days prior to abandoning or moving from the address of the previous registration.

Upon registering a person who has been convicted of an offense or received a deferred judgment for an offense in another jurisdiction, which offense, if committed or attempted in this state, would have been punishable as one or more of the offenses listed in Section 582 of this title, the local law enforcement authority shall forward the registration information to the risk assessment review committee of the Department of Corrections.

C. When a person has been convicted or received probation within the State of Oklahoma, the person shall be required to register as follows:

1. For a period of fifteen (15) years, if the numeric risk level of the person is one;

2. For a period of twenty-five (25) years, if the numeric risk level of the person is two; and

3. For life, if the numeric risk level of the person is three or the person is classified as a habitual or aggravated sex offender.

The registration period shall begin from the date of the completion of the sentence. The information received pursuant to the registration with the Department of Corrections required by this section shall be maintained by the Department of Corrections for at least ten (10) years from the date of the last registration.

D. When a person has been convicted or received probation within the State of Oklahoma, the person shall be required to register as follows:

1. For a period of fifteen (15) years, if the numeric risk level of the person is one;

2. For a period of twenty-five (25) years, if the numeric risk level of the person is two; and

3. For life, if the numeric risk level of the person is three or the person has been classified as a habitual or aggravated sex offender.

The registration period shall begin from the date of completion of the sentence and the information received pursuant to the registration with the local law enforcement authority required by this section shall be maintained by such authority for at least ten (10) years from the date of the last registration.

E. Any person assigned a numeric risk level of one who has been registered for a period of ten (10) years and who has not been arrested or convicted for any felony or misdemeanor offense since being released from confinement, may petition the district court in the jurisdiction where the person resides for the

purpose of removing the numeric risk level designation and allowing the person to no longer be subject to the registration requirements of the Sex Offenders Registration Act.

F. When registering an offender as provided in this section the Department of Corrections or the local law enforcement agency having jurisdiction shall:

1. Inform the offender of the duty to register and obtain the information required for registration as described in this section;

2. Inform the offender that if the offender changes address, the offender shall give notice of the move and the new address to the Department of Corrections and to the local law enforcement authority in the location in which the offender previously resided in writing no later than three (3) days before the offender establishes residence or is temporarily domiciled at the new address;

3. Inform the offender that if the offender changes address to another state, the offender shall give notice of the move and shall register the new address with the Department of Corrections and with a designated law enforcement agency in the new state not later than ten (10) days before the offender establishes residency or is temporarily domiciled in the new state, if the new state has a registration requirement;

4. Inform the offender that if the offender participates in any full-time or part-time employment, in

another state, with or without compensation for more than fourteen (14) cumulative days in any sixty-day period or an aggregate period exceeding thirty (30) days in a calendar year, then the offender has a duty to register as a sex offender in that state;

5. Inform the offender that if the offender enrolls in any type of school in another state as a full-time or part-time student then the offender has a duty to register as a sex offender in that state;

6. Inform the offender that if the offender enrolls in any school within this state as a full-time or part-time student, then the offender has a duty to register as a sex offender with the Department of Corrections and the local law enforcement authority;

7. Inform the offender that if the offender participates in any full-time or part-time employment at any school, with or without compensation, or participates in any vocational course or occupation at any school in this state, then the offender has a duty to notify the Department of Corrections and the local law enforcement authority in writing of such employment or participation at least three (3) days before commencing or upon terminating such employment or participation;

8. Inform the offender that if the offender graduates, transfers, drops, terminates or otherwise changes enrollment or employment at any school in this state, then the offender shall notify the Department of Corrections and the local law enforcement authority

in writing of such change in enrollment or employment within three (3) days of the change; and

9. Require the offender to read and sign a form stating that the duty of the person to register under the Sex Offenders Registration Act has been explained.

G. For the purpose of this section, the "date of the completion of the sentence" means the day an offender completes all incarceration, probation and parole pertaining to the sentence.

H. Any person who resides in another state and who has been convicted of an offense or received a deferred judgment for an offense in this state, or in another jurisdiction, which offense if committed or attempted in this state would have been punishable as one or more of the offenses listed in Section 582 of this title, and who is the spouse of a person living in this state shall be registered as follows:

1. With the Department of Corrections when the person enters and intends to be in the state for any purpose for five (5) consecutive days or longer, calculated beginning with the first day or an aggregate period of five (5) days or longer in a calendar year. Such registration is required within two (2) days after entering the state; and

2. With the local law enforcement authority having jurisdiction in the area where the person intends to reside or to stay within this state for two (2) consecutive days or longer, calculated beginning with the

first day. The registration is required with local law enforcement within two (2) days after entering the jurisdiction of the law enforcement authority.

I. The duty to register as a sex offender in this state shall not be prevented if, at the time of registration, it is determined that the person owns or leases a residence that is located within a restricted area provided for in Section 590 of this title.